Officially reported in 253 F. 2d 922.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16699

RIVER TERMINALS CORPORATION,
Appellant,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 9, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment for libelant for the loss of its cargo of molasses shipped by it on its own barge under tow of libelee-appellant. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of appellant in navigation or management of the tow.

The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Inter-

state Commerce Act, 49 U.S.C.A. § 901, et seq., which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise.

The trial court, in its findings of fact, said:

> "This movement, according to bill of lading issued by River on September 17, 1944, [the day the shipment commenced] was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisions:
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> "'When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise.'"

Clearly, therefore, unless this provision of the tariff, which, of course, becomes a part of the contract, is to be ignored, the appellant is entitled to its benefit. As to whether the quoted provision of the tariff is valid or is void as against public policy we must at once recognize that in the recent case of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al*, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect. In a case which, so far as is germane to the present issue, was identical with this one, the defense was made that both the tariff and the bill of lading (there issued several weeks after the damage) relieved the towing company of liability. Referring to *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, a case involving a private contract of tow-

age, in which the parties by contract sought to relieve the tower from results of its own negligence, but which efforts the Supreme Court, in a 6-3 opinion, struck down as against public policy, this Court in an opinion participated in by the writer of this opinion, said:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the *Bisso* case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellee here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

Recognizing full well the unsettling effect of differing decisions within the same circuit in similar cases, and with every deference to the views of our colleagues who decided the *Mississippi Valley Barge Line Company* case, we deem it to be our clear duty to consider carefully what the law is on this important and far-reaching question. If we conclude that the law was incorrectly stated by us previously, it is our duty to proceed in this cause as we believe the law requires.

There is an important factor in cases of this kind that was not commented on by this Court in the earlier case. It looms so large in the consideration we now give to this case that we think it likely that failure by the Court to discuss it in the *Mississippi Valley* opinion indicates that it was overlooked. That is the rule frequently stated by the Supreme Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520; *Crancer v. Lowden*, 315 U.S. 631, 635.

There is then the equally important principle, also not discussed in our earlier opinion, that when tariffs

embody terms whose initial adoption or subsequent modification involves issues of transportation policy, they ought not to be ignored, set aside, or otherwise set for naught, except after consideration by the Interstate Commerce Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act. *United States v. Western Pacific Railway Co.*, 352 U.S. 59. An illustration in which the Supreme Court applied this principle is *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, and its subsequent appearance sub. nom. *El Dorado Oil Works, et al v. United States, et al*, 328 U.S. 12. And see, for cases in which the approved procedure was followed in the first instance, *Secretary of Agriculture v. United States, et al*, 350 U.S. 162, and *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra.*

For the reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, et seq. Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce. Under this law[1] every common carrier (and

[1] Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act (49 U.S.C.A., Section 906):

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs, showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

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for the purpose of this discussion this includes towers as well as other carriers) is required to file and keep on file with the Interstate Commerce Commission its tariff "showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation of interstate or foreign commerce * * * between places on its own route," which shall plainly state among other things, "any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the services rendered to the passenger, shipper or consignee." No carrier is permitted, under the Act to depart, in the furnishing of carriage, from its published tariffs.

The Commission may, under the Act, permit the filed tariffs to become effective or it may suspend them temporarily and either on its own motion or on the motion of an aggrieved party, inquire into the reasonableness and legality of any such rate or charge. Upon the resolution of any such inquiry, the Commission makes its order which is binding and final unless brought in question in the manner provided in 28 U.S.C.A. §§ 2321 2323. This is by suit against the United States and the Interstate Commerce Commission in which any interested party may intervene. It is tried by a statutory three-judge district

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[1] (Continued)

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of Part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water."

court from which there is a direct appeal to the Supreme Court.

In the exercise of its statutory power the Commission permitted the appellant to file its questioned tariffs which, so far as this record shows, became immediately effective. The record does not disclose that either on the objection of shipper or otherwise any complaint or other challenge has ever been made with the Commission attacking the validity of the tariffs. We are asked to hold that, regardless of the circumstances prevailing in the towing industry which caused the appellant to fix its freight charges on the basis of appellee's assuming all the risks of negligent navigation of the tower, all of which must be assumed to have caused the Commission to "approve" the tariffs and which were deemed sufficiently acceptable to shippers as to prevent them from filing a complaint thereabout, there is a public policy that outlaws the exculpatory provision as a matter of law. This it is said, follows from the Court's decision in Bisso *supra*, outlawing such a clause in a private contract of towage.

We think that when Congress has given to the Commission the extensive supervisory and regulatory power over the shipping industry with special responsibilities as to the prevention of monopolistic practices, and when the Commission permits the establishment of rates which limit the liability of carriers (presumably because there are, or may be required to be at the instance of a complaining shipper, alternative rates which place full liability on the tower) it has done so in the proper discharge of its responsibility to shipper, carrier and the public alike, and no overweening policy to invalidate one of the terms of such a tariff arises. Certainly not as a matter of law and without benefit of the Commission's initial inquiry and findings relating to the matter.

As is indicated in the concurring opinion, also expressed somewhat differently in the dissenting opinion in the *Bisso* case, the presence or absence of an overriding public policy depends on facts and circumstances that in litigation between private parties must be developed in the record:

> "It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule." 349 U.S. 85, 97.

And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion)."

It would seem that as to common carriers, as to which Congress has given regulatory power to the Commission, the Commission's actions with respect to the terms of carriage should not be upset by the courts without their first having the factual background mentioned above first examined by the Commission and its relation to the assailed clause inquired into by it.

That there is no general public policy forbidding the exculpation of water carriers for their negligence is made amply apparent by the enactment by Congress more than half a century ago of the Harter Act,[2] which in effect relieves carriers of liability for error or fault in naviga-

[2] "§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in

(Continued)

tion or management of the vessel if they have provided a seaworthy craft. Here appellant claims to be entitled to that very protection, since it says it is such owner of a vessel as is comprehended by the Harter Act. Without deciding that issue, since we think we do not reach it,[3] but assuming for the purpose of this discussion that the terms of the Act do not apply here because this is to be considered a movement of towage rather than "transportation of property," the existence of the law is not consistent with a theory that at all times and under all circumstances it is against public policy for water carriers to be free of liability for their own negligence. We think the Supreme Court did not so decide in Bisso and we think that such exemption from liability may, within the purview of the Interstate Commerce Act, be one of the matters with which the Commission may deal in approving rates, charges and services of the carriers whose activities it has the duty to regulate. In any event we conclude that we should not hold such a part of a published tariff void until the parties have proceeded administratively to have it set aside. The method of such administrative determination is clearly set forth in *General American Tank Car Corp. v. El Dorado Terminal Co., supra*, and see *United States v. Western Pacific R. Co., supra*.

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[2] (Continued)
navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C.A. §192.

[3] It is to be noted that in *Mississippi Valley Barge Line Co. v. James, supra*, on a slightly different record, we did hold that this statute was not applicable because towage rather than affreightment was involved. The Harter Act does not apply to towage and the difference here in that the trial court found as a fact that this movement was under the terms of a bill of lading subject to tariffs that were clearly adjusted to affreightment, but then concluded that this too was towage.

Nor do we think that anything in Section 920(d)[4] of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities.

The judgment is reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[4] §920. Repeals.

* * * * *

"(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter." 49 U.S.C.A. §920(d).

SECTIONS 303(b), 303(d) AND 303(e) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 903, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 303, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 931, AND AMENDED 1946 REORG. PLAN NO. 3, §§ 101-104, EFF. JULY 16, 1946, 11 F.R. 7876, 60 Stat. 1097, JUNE 12, 1948, c. 457, 62 Stat. 386

(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

* * * * *

(d) Nothing in this chapter shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Commandant of the Coast Guard pursuant to the provisions of section 391a of Title 46.

* * * * *

(e) (1) Notwithstanding any provision of this chap-

ter the Commission may, by order, from time to time, upon application, or upon its own initiative without application, exempt from the requirements of this chapter the transportation of passengers between points in the United States by way of a foreign port or ports, upon a finding that application of such requirements thereto is not necessary to carry out the national transportation policy declared in this chapter and chapters 1, 8 and 13 of this title.

(2) It is declared to be the policy of Congress to exclude from the provisions of this chapter, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported; their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this chapter or chapter 1 or 8 of this title. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this chapter such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this chapter until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time

(or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

SECTIONS 305(a) AND 305(c) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 905(b); ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 305, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 934

(a) It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.

* * * * *

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable

preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

SECTIONS 306(a), 306(c) AND 306(d) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 906, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 306, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 935

(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and

joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * *

* * * * *

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of section 1 (7) and 22 of part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

* * * * *

(d) No common carrier by water, unless otherwise provided by this part, shall engage in transportation subject to this part unless the rates, fares, and charges upon

which the same are transported by said carrier have been filed and published in accordance with the provisions of this part. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions.

SECTION 314 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 914, ACT OF FEBRUARY 4, 1887, c. 104, PART III, SECTION 314, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, SECTION 201, 54 Stat. 945

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 320(d) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 920(d), ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 320, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 950

(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter.

REVISED STATUTE 4282, BEING 46 U.S.C. 182, ACT OF MARCH 3, 1851, c. 43, § 1, 9 Stat. 635

LOSS BY FIRE

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

SECTION 1 OF THE HARTER ACT, BEING 46 U.S.C. 190, ACT OF FEBRUARY 13, 1893, c. 105, § 1, 27 Stat. 445

Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping

document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SECTION 2 OF THE HARTER ACT, BEING 46 U.S.C. 191, ACT OF FEBRUARY 13, 1893, c. 105, § 1, 27 Stat. 445

Stipulation relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened weakened, or avoided.

SECTION 3 OF THE HARTER ACT, BEING 46 U.S.C. 192, ACT OF FEBRUARY 13, 1893, c. 105, § 3, 27 Stat. 445

Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any

vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SECTIONS 1 AND 2 OF THE CARRIAGE OF GOODS BY SEA ACT, BEING 46 U.S.C. 1304, ACT OF APRIL 16, 1936, c. 229, § 4, 49 Stat. 1210

Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph (1)

of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

ITEMS 580, 640 AND 896(g) OF RIVER TERMINALS CORPORATION'S TARIFF I.C.C. NO. A-9

ITEM NO. 580

Carriers' Non-Liability

* * * * *

"When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the Carriers parties to this Tariff, such barges and (or) cargoes will be handled at owner's risk only, whether loss or damage is caused by negligence or otherwise."

* * * * *

"ITEM NO. 640

"Furnishing of and Handling Barges

"The carriers parties to this Tariff will furnish open or closed type cargo barges, depending on character of material to be transported. TANK BARGES WILL NOT BE FURNISHED.

* * * * *

* * * * *

"Presentation of a shipment in barge furnished by shipper, consignee or owner for movement on rates named herein shall constitute a guarantee to the Carriers parties to this Tariff that such barge is seaworthy and barge and cargo are in suitable condition for voyage in prospect. However, the Carriers parties to this Tariff, despite such implied guarantee, shall be privileged to refuse acceptance if the barge is in apparent bad order. If unfitness of barge or cargo is discovered after voyage has begun, then the Carriers parties to this Tariff shall be privileged to deliver such barge at nearest landing for holding at expense of shipper, consignee or owner, in which event freight charges shall be adjusted in conformity with rates provided in this Tariff for distance barge was actually moved by the Carriers parties to this Tariff. If deficiencies are remedied by shipper in the judgment of the Carriers parties to this Tariff, shipper may reforward the barge to ultimate destination at through rate applicable without additional charge for the stop over for repairs.

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"ITEM NO. 896(g)

"Actual Placement—Actual placement of barge or barges is delivery of the barge or barges by the carrier to the point of loading or unloading designated by Shipper, consignee or their agents".

[Exhibit Libellant 15]

WHEREAS, on September 24, 1944, the barge "ABL-109" now called the "PETER B" owned by the INTERNATIONAL TRANSPORTATION CORPORATION was insured by the CONTINENTAL INSURANCE COM-

PANY OF THE CITY OF NEW YORK under their certain hull policy, in the sum of $20,000.00 which policy attached November 11, 1943 and expired on November 11, 1944, and

WHEREAS, under date of September 24, 1944, the barge "Peter B" sank while moored to a dock at Texas City, Texas, and

WHEREAS, the INTERNATIONAL TRANSPORTATION CORPORATION, owners of said barge "Peter B", in the raising and repairing of the barge "Peter B" as a result of said sinking expended the sum of approximately $15,000.00, and

WHEREAS, the INTERNATIONAL TRANSPORTATION CORPORATION has made claim against the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK under said policy to recover back the amount so expended as being due it under said policy, but for which claim the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK does not admit liability,

NOW THEREFORE without either party receeding from the position taken by them and solely in a spirit of compromise it is stipulated and agreed between them as follows:

(1) That in consideration of the payment to the INTERNATIONAL TRANSPORTATION CORPORATION by the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK of the sum of $7,500.00 the receipt of which is hereby acknowledged the INTERNATIONAL TRANSPORTATION CORPORATION hereby declares that it accepts said sum in full settlement,

satisfaction and discharged by compromise of any and all claims, whether in equity, admiralty, or law, which it has had, now has, or may hereinafter have against the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, under the aforesaid policy issued by it as herein stated, growing out of or arising as a result of the aforesaid sinking of the barge "Peter B" or, "A B L-109", and on September 24, 1944,

(2) That as a further consideration of this settlement the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK hereby agrees to and does hereby waive subrogation in any sum or to any extent as to the rights of the INTERNATIONAL TRANSPORTATION CORPORATION against the River Terminals Corporation and/or its tug and/or tugs that towed the barge "Peter B" from Reserve, Louisiana, and delivered her to Texas City, on September 23, 1944.

This done and executed in quadruplicate original in the City of New Orleans, on this 6th day of January, 1945, in the presence of the undersigned competent witnesses.

CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
By /s/ J. K. Sadler

WITNESSES:
/s/ Edw. F. Bowman, Jr.
/s/ Denise Freeman

INTERNATIONAL TRANSPORTATION COMPANY
By /s/ John D., M. A.,
Edwin H. Grace
Attorney in law and in Fact

WITNESSES:
/s/ Edwin H. Grace
/s/ Shirley Schexnaydre
TRIPLICATE ORIGINAL

TEXAS NAUTICAL SCHOOL
CAPT. A. A. COLBURY, Principal
YACHTING, PILOTAGE, NAUTICAL ASTRONOMY, NAVIGATION, CELESTIAL AND TERRESTRIAL

Compass Adjusting & Repairs
Nautical Instruments

516 Cotton Exchange Building
Phone Charter 4-2439
HOUSTON, TEXAS

Port of Houston, Texas
October 10, 1944

TO WHOM IT MAY CONCERN:

RE: REPORT OF SURVEY, BARGE "PETER B"

Acting at the request of the International Transportation Corporation, owners of the subject barge, this undersigned surveyor did on October 12, 1944, attend the barge while upon drydock at Houston, Texas, for the purpose of ascertaining and reporting upon the condition of the shell plating.

Upon examination: Found:

Bottom plating including knuckle good.

Upper strake plating port and starboard sides good.

Rake plating good.

Heavy scale present on lower strake plating port and starboard sides of barge from the light load line up for a distance of 4' and for the full length of the barge.

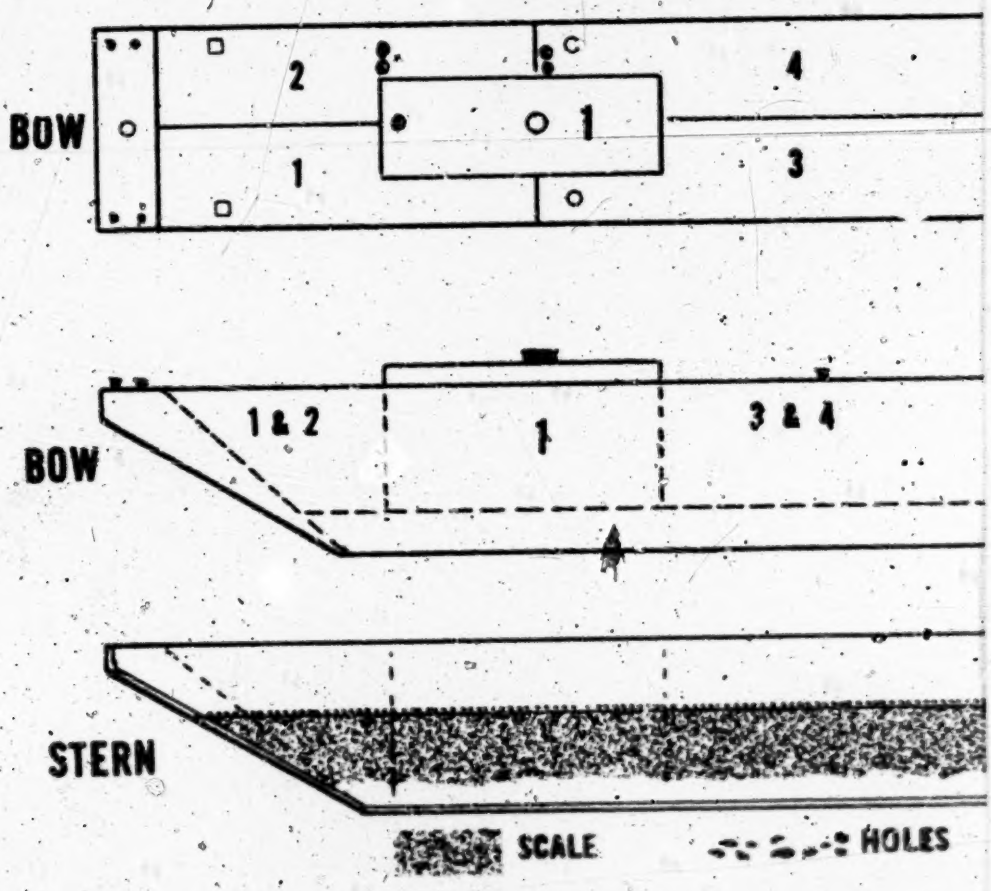
Portions of the scale had been removed from the side plating of #2 tank starboard side exposing several small pinholes in the plate over an area of 48" x 21". This wasted section of the plating is being renewed, and in the opinion of this undersigned surveyor when completed the barge will be in a satisfactory seaworthy condition for present service.

This survey was made without prejudice.

/s/ A. A. Colbury

Capt. A. A. Colbury
Surveyor

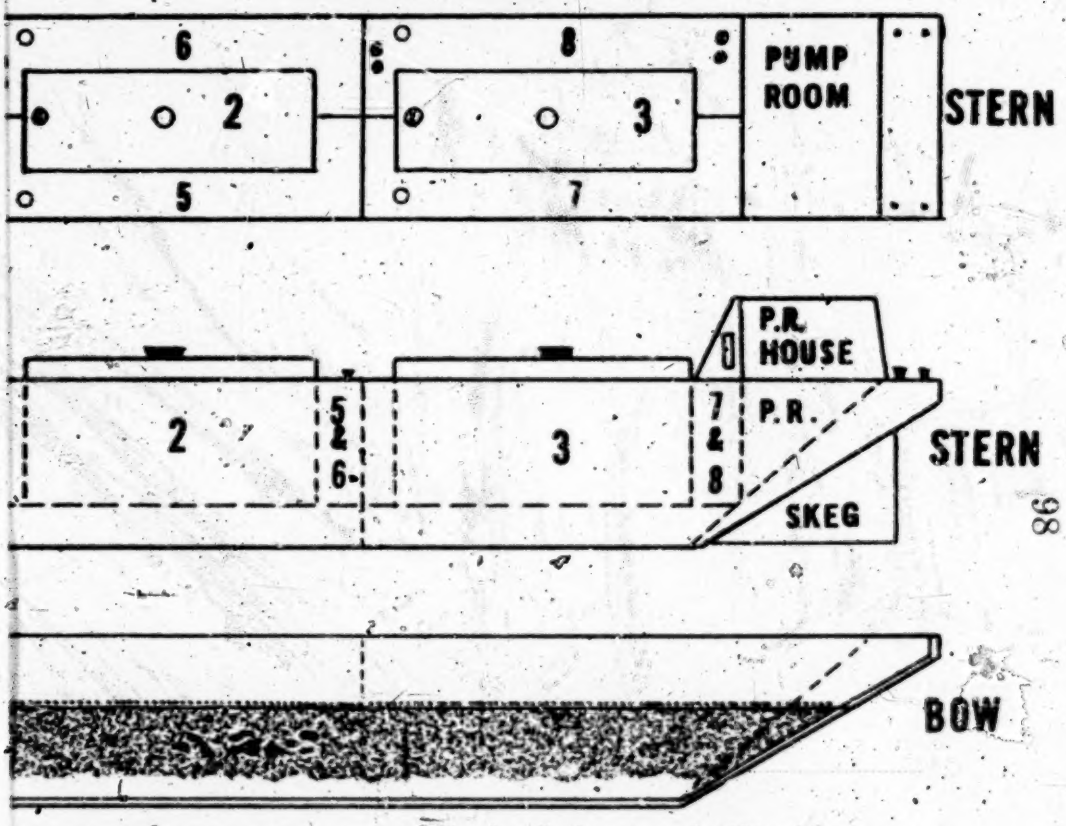
HOPPER TYPE BARGE
Size 175′ x 26′4″ x 11′.



Found:

1. Deck set down and thirty foot of plate e
2. Deck plating torn in way of ends of cly
3. All eleven valve stems bent and packing
4. All manhole covers—none water tight a
5. Five Salvage Holes in Deck 8″ diamete

BARGE "PETER B"
Converted into Oil Barge



eavy scale present over all shaded area both sides.
ull above and below—good. HBL

es separated by welding having pulled apart.
er tanks.
issing from glands.
holding down bolts and dogs froze.

[Sketch of Exhibit Lambdin 1]